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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 936 41

GENERAL UTILITIES & OPERATING COMPANY,
Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

R. KEMP SLAUGHTER,
HUGH C. BICKFORD,
JOSEPH A. SLATTERY,
Counsel for Petitioner.

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

This is a petition for writ of certiorari to the United States Circuit Court of Appeals, Fourth Circuit, involving a decision by that Court in the case of *Guy T. Helvering, Commissioner,* v. *General Utilities & Operating Company, Respondent,* No. 3720, reported at 74 (2d) 972, wherein the Court reversed a decision of the U. S. Board of Tax Appeals, 29 B. T. A. No. 165. On application of respondent the Court, on February 6, 1935, entered an order staying the mandate of the Court pending action by the Court on

a petition for rehearing. Petition for rehearing was filed on that date and on April 2, 1935, the petition was denied. (R. 133.)

Questions Presented.

The case presents the following questions:

1. Did the U. S. Circuit Court of Appeals, in reversing the U. S. Board of Tax Appeals, err in holding that petitioner derived taxable profit from the sale of certain common capital stock of the Islands Edison Company by its thirty-three stockholders who had received the said stock at an appreciated fair market value through a dividend distribution duly authorized and made by the petitioner?

2. Did the Circuit Court of Appeals err in rendering opinions on facts not found by the Board of Tax Appeals but for the first time presented on appellate brief of petitioner below.

Summary Statement of the Matter Involved.

The evidence in the case, submitted in written stipulation (R. 11-21), may be summarized as follows:

The petitioner is a Delaware corporation with its principal offices at Baltimore, Maryland. It is engaged in the business of owning securities of, managing and operating public utilities properties.

On January 1, 1927, the petitioner acquired 20,000 shares of no par value of the common capital stock of the Islands Edison Company. The remaining outstanding 20,000 shares of stock of this company were owned by Gillett & Company, which is not connected with petitioner nor with petitioner's stockholders. The cost to petitioner of its 20,000 shares of common capital stock of the Islands Edison Company was $2,000.

In January, 1928, Walter Whetstone, President of the Southern Cities Utilities Company, became interested in acquiring this Islands Edison Company stock. Upon inquiry and after conversations with J. C. M. Lucas, President of the petitioner, and Gillett, of Gillett & Company, a price was agreed upon for the sale of all the Islands Edison Company stock to Southern Cities Utilities Company. Whetstone was informed by Lucas that if a sale of the 20,000 shares of the common stock of Islands Edison Company then owned by petitioner were consummated, such a sale would be made only after petitioner had distributed the Islands Edison Company shares to its stockholders, because attorneys had advised that if sale were made by petitioner it would be subject to a profit tax and that when the proceeds of the sale were distributed to the stockholders the stockholders would have to pay another tax. The price to be paid for the properties and generally the terms and conditions of the sale were agreed upon by Gillett, Lucas and Whetstone, but no contract was entered into by them. Lucas did not hold power of attorney to sell said stock for the petitioner or its stockholders. It was understood and agreed that petitioner would make distribution of the stock of the Islands Edison Company to its stockholders and that counsel would prepare a written agreement embodying the terms and conditions of the said sale, to be submitted for approval to the stockholders of the Islands Edison Company after the distribution of the stock by the petitioner.

On March 22, 1928, the petitioner's directors gave consideration to the then value of the stock of the Islands Edison Company and authorized, by proper resolution, that an entry be made on the books of the petitioner crediting its surplus in the amount of $1,120,500 to represent the appreciated value of the stock. Thereupon a dividend in the amount of $1,071,426.25 was declared on the common stock

of the petitioner, payable out of this appreciated surplus in common stock of the Islands Edison Company at a valuation of $56.12½ a share.

On March 22, 1928, in accordance with the resolution of the directors, the petitioner distributed to its own stockholders 19,090 shares of the stock of the Islands Edison Company, such shares representing two shares of the Islands Edison Company stock theretofore owned by petitioner for each share of the 9,545 shares of petitioner's own capital stock then outstanding. On the same date the shares of stock were transferred on the stock records of the Islands Edison Company to the individuals receiving the distribution. After the transfer of the 19,090 shares by dividend distribution there remained in the hands of the petitioner 910 shares of stock of the Islands Edison Company and a new certificate for such shares was issued to it on March 22, 1928.

On March 26, 1928, the stockholders of the Islands Edison Company (one of which was the petitioner, owning 910 shares) and the Southern Cities Utilities Company, entered into a written contract of sale of the Islands Edison Company stock. At no time did petitioner agree with Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the aforesaid 910 shares of the Islands Edison Company stock.

The 910 shares of the Islands Edison Company stock were sold by petitioner to the Southern Cities Utilities Company on May 14, 1928, and a profit of $46,346.30 was reported on the 1928 tax return filed by the petitioner. The sales price was $51.25 per share, which resulted in the aforesaid profit after deducting the cost of 910 shares at 10¢ per share. Certain brokerage charges, commissions and other expenses which were charged against the stockholders in accordance with the contract of sale, had reduced

the share value of $56.12½ for the stock at date of dividend distribution to $51.25 per share at date of sale.

Although petitioner received no cash or other property in the dividend distribution of 19,090 shares of stock, the respondent upon auditing the return of the petitioner held that it derived a profit of $1,069,517.25 from the dividend distribution. This was determined by deducting $1,909, the cost of the 19,090 shares distributed to the stockholders from the market value of the stock at $56.12½ per share.

On this alleged profit the respondent asserted a deficiency against petitioner in the amount of $128,342.07; appeal was taken to the U. S. Board of Tax Appeals on the theory of the respondent that

> "upon the declaration of the dividend on March 22, 1928 petitioner became indebted to its stockholders in the amount of $1,070,426.25 and that the discharge of that liability by the delivery of property costing less than the amount of the debt, constituted income."

On April 24, 1933, a division of the Board rendered opinion that

> "the intent of the directors of petitioner was to declare a dividend payable in Islands Edison stock; their intent was expressed in that way in the resolution formally adopted; and the dividend was paid in the way intended and declared. We so construe the transaction and on authority of *First Utah Savings Bank, supra,* we hold that the declaration and payment of the dividend resulted in no taxable income."

This opinion on order of the Chairman of the Board was reviewed by the full Board which approved the opinion, six members dissenting.

Appeal was taken by the respondent and the Circuit Court, while holding that a dividend distribution of stock had been made by petitioner, decided there was a plan to

avoid payment of the tax by petitioner and that the subsequent sale of the stock by the thirty-three stockholders was "in substance" a sale by the petitioner.

Reasons Relied Upon for Allowance of the Writ.

1. The decision of the court reversing the U. S. Board of Tax Appeals is in conflict with decisions of this Court and decisions of the Circuit Courts.

It is established by decisions of this Court that "the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits cannot be doubted." *Gregory* v. *Helvering,* decided by this Court January 7, 1935, just one day prior to the decision of the Circuit Court of Appeals in this proceeding. *U. S.* v. *Isham,* 17 Wall. 496, 506; *Superior Oil Company* v. *Miss.,* 280 U. S. 390, 395-6. The decision is in direct conflict with *Jones* v. *Helvering,* 71 F. (2d) 214, 217 (Ct. App. D. C.), cited with approval by this Court in *Gregory* v. *Helvering, supra.* The Court below held in this appeal that

> "Such admitted facts plainly constituted a plan, not to use the harsher terms of scheme, artifice or conspiracy, to evade the payment of the tax. For the purpose of this decision it is not necessary to consider whether such a course as is here shown constituted a fraud, it is sufficient if we conclude that the object was to evade the payment of a tax justly due the Government."

2. The decision ignores the separate entities of the corporation and its stockholders, and is in conflict with decisions of this Court, Eisner v. Macomber, 252 U. S. 189; it is contrary to well recognized principles of corporate law, 7 R. C. L. at par. 270, 281; it is contrary to the intent of the Revenue Act and the Treasury Regulations thereunder. Section 115 of the Revenue Act of 1928, Article 627 of T. D. 74, applicable to the Revenue Act of 1928.

It seems to be well settled that where a dividend has been fully declared the corporation thereby manifests its intention that the amount of the dividend should be considered as having been separated from the other property of the corporation and as having become the individual property of the stockholders and that, therefore, when the dividend becomes payable according to the terms of the vote declaring it, each stockholder has a right to demand payment of the proportional part of the dividend which belongs to his share of stock and to sue the corporation for it if it is not paid on demand. (See also *State of Maryland* v. *Baltimore & Ohio R. R. Co.*, 6 Gill. 363.)

It is also a general rule of law that a corporation has a personality of its own distinct from its stockholders and that it is not affected by contracts made directly or by its stockholders with third persons, whether they own much or little of its capital stock. *Sellers* v. *Grier*, 172 Ill. 549, 50 N. E. 246, 4 L. R. A. 589; *Harris* v. *Muskingam Mfg. Co.*, 4 Blackf. (Ind.) 267, 29 Am. Dec. 372; *Fitzpatrick* v. *O'Neill*, 43 Mont. 552, 118 Pac. 273; *Eisner* v. *Macomber*, *supra*; *New Colonial Ice Co. Inc.* v. *Helvering*, 292 U. S. 435.

The regulations of the Treasury Department, Article 627 *supra* recognizes that a corporation may elect to distribute property in kind to its stockholders instead of effecting realization by sale. When a dividend distribution of prop-

erty is made by a corporation, it is taxed as income to the stockholder to the amount of the fair market value of the property when received by the shareholder. This was the effect of the decision of the Board in this case and the distribution of this stock of substantial value necessarily imposed on the recipients high taxes under the surtax brackets.

The decision below, on the contrary, holds that the thirty-three stockholders were the same entity as the corporation, a holding which completely destroys the concept of corporate entity.

3. The decision is contrary to the basis of loss or gain provided for in the Revenue Act of 1928—Sections 111, 112 and 113.

The sale of this Islands Edison stock was made by the individual owners, under full legal title. The stock having been taxed to owners at fair market value when received and having been sold by them at less than fair market value they really suffered a loss in the sale. The decision of the court below imposes a tax on the corporation through a sale "in substance" by it, although the basis of the sale under the decision was not the actual selling price of $51.25 for the stock but its fair market value of $56.12½ which is the same value on which the stockholders have been assessed for taxes under Article 627 *supra*. The actual selling price of $51.25 realized by the stockholders has not been considered.

4. The decision raises an important question as to the jurisdiction of the Circuit Court of Appeals to decide a question of fact not raised before the Board of Tax Appeals.

It is of great importance that this Court pass upon the question whether the Circuit Courts of Appeals have juris-

diction to consider new questions not raised before the Board of Tax Appeals, and not covered by the petition for review nor by an assignment of error. Particularly is this so as to questions involving facts contrary to the stipulated facts. In the lower courts and in the profession there exists great doubt as to the extent of the jurisdiction of the courts to consider such questions, which doubt should be dispelled by an authoritative decision of this Court. See concurring opinion of Judge Denison in *Commissioner* v. *Winkler & Bro. Co.*, 53 F. (2d) 580, 583, calling attention to the doubt and conflict on this score, and the differences in the different circuits. See also the divided opinions in recent cases in the First Circuit: *Sturtevant Co.* v. *Commissioner*, 75 F. (2d) 316; *Heywood Boot & Shoe Company* v. *Commissioner*, decided April 1, 1935, not yet reported.

5. **The decision below is utterly inconsistent with the decision of this Court in Helvering, Commissioner, v. Rankin, decided April 29, 1935, not yet reported but see Index 828, United States Law Week.**

In the above case this Court said:

"It was only by departing from the facts as found by the Board that the Court found justification for reversing the Board's decision." The Board found that the stock was distributed by the corporation, that it became the property of the scotkholders, that "the stockholders" made the sale. It likewise found that "at no time did petitioner agree * * * verbally or in writing, to make sale." The court below assumes, without basis in the findings of the Board, that some agency existed, that the sale was made by the petitioner corporation. The decision in *Helvering, Commissioner*, v. *Rankin*, also clearly established that the court below was without authority to consider the new question not presented to the Board below and not raised

in the petition for review before the court. It was injected into the case only upon argument.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, Fourth Circuit, commanding the court to certify and transmit to this Court for review and determination on a date to be therein named, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its docket No. 3720, Guy T. Helvering, Comr. of Internal Revenue, Petitioner, *v.* General Utilities and Operating Company, Respondent; and that said judgment of said Circuit Court be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

R. KEMP SLAUGHTER,
HUGH C. BICKFORD,
JOSEPH A. SLATTERY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the U. S. Board of Tax Appeals reported in 29 B. T. A. No. 165, appears at pages 23 to 32 of the printed record. The opinion of the Circuit Court of Appeals, Fourth Circuit, reported in 74 F. (2d) 972, reversing the decision of the U. S. Board of Tax Appeals, was entered January 8, 1935, and appears in the printed record at pages 62 to 72. The judgment of the court entered January 9, 1935, appears at page 73 of the record. Petition for rehearing filed by respondent below on motion approved by the court on February 6, 1935, appears at pages 75 to 131 of the printed record. The petition for rehearing was denied April 2, 1935 (R. 133).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, and under Section 1003 of the Revenue Act of 1926.

Facts.

Stripped of useless verbiage the facts are simply that petitioner, through its president, found a purchaser for 20,000 shares of Islands Edison stock which it owned and had acquired at a cost of $2,000. To avoid a double tax on both the corporation and its stockholders on the sale of this stock, petitioner, by resolution of its directors, gave the stock a determined fair market value and declared a dividend payable to its stockholders in stock of the

Islands Edison Company. The stockholders were taxed on the receipt of the dividend, under Article 627 of Treasury Regulations 74, at the fair market value of the stock as indicated by the appreciation entry on the books of the petitioner and its dividend resolution.

The Commissioner, in auditing the tax returns of petitioner, took the position that petitioner in setting up a value of $1,071,426.25 on this stock made a taxable profit of $1,069,517.25 by declaring a dividend payable in stock of the declared value "for the reason that the satisfaction of the obligation by the distribution of the stock was in effect a sale of the stock and a distribution of the proceeds" (R. 8). The Commissioner admitted, however, that if the dividend resolution of petitioner had "merely provided for the distribution of the stock as a dividend there would clearly have been no gain to the corporation" (R. 8).

This was the only question presented to The Board of Tax Appeals, which held adversely to the Commissioner, and appeal was taken to the Circuit Court of Appeals, Fourth Circuit, by the Commissioner. The court, while sustaining the Board in holding that the dividend distribution was made in stock of the Islands Edison Company, decided that "the object was to evade the payment of a tax justly due the Government" and that "in substance the transaction here involved was a sale of the stock of the Islands Edison Company by respondent" (below) (R. 72), on the assumption that the stockholders were the agents of respondent. There was no assignment of error before the court on such a question (R. 50). It was raised for first time in the brief of petitioner below.

The Law.

The applicable provisions of the statutes and regulations are set out in the appendix.

Specifications of Error.

Petitioner makes the following assignments of error which will furnish the basis of the following argument in support of the allowance of writ.

1. The U. S. Circuit Court of Appeals erred in reversing the U. S. Board of Tax Appeals in holding that petitioner derived taxable profit from the sale of certain common capital stock of the Islands Edison Company by its thirty-three stockholders who had received the said stock through a dividend distribution duly authorized and made by the petitioner.

This assignment or error involves the following questions of fact and law:

A. The reality of the transaction.

B. The legal entity of stockholders as distinguished from that of the corporation.

C. The legal effect of a corporate act in the avoidance of taxation.

D. The relationship of the stockholders to the corporation under the principles of agency.

2. The Circuit Court of Appeals erred in rendering opinion on an issue and upon facts not found by the Board but for the first time presented on appellate brief of petitioner below.

ARGUMENT.

The confusion of thought which has arisen in this case begins with the theory of the Commissioner that *a mere declaration and recording of fair market value* of stock owned by a corporation creates taxable gain to a corporation if the stock on this declared value is, by dividend reso-

lution, distributed to stockholders. The Commissioner under this theory overlooks the provisions of his own Regulations (Article 627 of Treasury Regulations 74) which provides for tax to the stockholders at fair market value of the property distributed by dividend regardless of cost. This regulation protects the Treasury if the corporation elects to distribute the property instead of making sale.

The U. S. Board of Tax Appeals has very definitely, however, drawn the distinction between a dividend *payable in cash* and satisfied by payment in property at a value in excess of cost (*Callahan Road Improvement Co.*, 12 B. T. A. 1109; *Bacon-MacMillan Veneer Co.*, 20 B. T. A. 556), and a dividend *payable in property* having a definite fair market value, *First Utah Savings Bank* v. *Commissioner*, 17 B. T. A. 804, affirmed 53 F. (2) 919; Hollenberg Music Co., 6 B. T. A. 421.

We are not concerned here with dividends payable in cash and satisfied by payment in property at a value in excess of cost but as a practical matter it seems that any obligation created voluntarily by a corporation without any benefit to it by way of increment of surplus but in reality an impairment of surplus through dividend distribution does not give rise to "gain derived from capital, from labor, or from both combined, including profit gained through the sale or conversion of capital." *Eisner* v. *Macomber*, 252 U. S. 189; *First Utah Savings Bank*, 53 F. (2d) 919 (C. A. D. C.)

Appreciation has never been recognized by the Commissioner of Internal Revenue as the basis for determining taxable gain. Articles 71 and 322 of Treasury Regulations 74.

(a) *The Reality of the Transaction.*

The Commissioner of Internal Revenue, in his assessment letter from which this appeal was taken under the

provisions of Section 274 of the Revenue Act of 1926 said that if the dividend resolution had

> "merely provided for the distribution of the stock as a dividend there would clearly have been no gain to the corporation" (R. 8).

The Board of Tax Appeals, on the stipulated facts submitted on appeal (R. 11) held (R. 45) that

> "The intent of the directors of petitioner was to declare a dividend payable in Islands Edison stock; their intent was expressed in that way in the resolution formally adopted; and the dividend was paid in the way intended and declared. We so construe the transaction and on authority of First Utah Savings Bank, *supra*, (17 B. T. A. 804, affirmed 53 F. (2) 919), we hold that the declaration and payment of the dividend resulted in no taxable income."

The Circuit Court of Appeals, sustaining these facts found by the Board, said:

> "As to the first contention we are of the opinion that the action of the Board of Tax Appeals was correct. The resolutions of the Board of Directors of the respondent declaring the dividend, is capable of only one interpretation, that the dividend was payable not in cash but in the common stock of the Islands Edison Company. Under this resolution the stockholders could not, in the event of the failure to deliver the stock of the Islands Edison Company, have the right to recover an equal amount of stock. In the case of *The State of Maryland* v. *Baltimore & Ohio Railroad Co.*, 6 Gill 363, a discussion will be found as to a dividend declared under a resolution analagous to the one here in question and in that case a conclusion was reached similar to that reached by us here."

The facts in this case, under judicial opinion, are, therefore, not unreal, as in *Gregory* v. *Helvering*, L. Ed. Adv. Opinions, Vol. 79. The dividend distribution was in corpo-

rate order. There was a vested property in the recipients of the dividend on which taxes were assessable to the recipients at the date of investment at the fair market value of the property (Article 627 of Treasury Regulations 74, applicable to the Revenue Act of 1928).

(b) *The Legal Entity of Stockholders as Distinguished from that of the Corporation.*

The petitioner recording the fair market value of $56.12½ per share for the Islands Edison Company stock declared and paid a dividend payable in that stock. This Court said in *Eisner* v. *Macomber*, 252 U. S. 189:

> "We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practicable fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder."

The dividend was taxable to the stockholders of the petitioner at its designated fair market value of $56.12½ per share. Thereafter the corporation had no title or interest in the property distributed.

(c) *The Legal Effect of a Corporate Act in the Avoidance of Taxation.*

The petitioner exercised a right recognized by the Revenue Acts and the Treasury Regulations applicable thereto. Instead of selling the Islands Edison stock and paying a corporate income tax thereon the stock was, through authorized dividend resolution, distributed to its stockholders and immediately became taxable to the stockholders at its designated fair market value of $56.12½. Article 627 of Regulation 74, *supra*, is the check provided by the Reve-

nue Act and Treasury Regulations to insure collection of internal revenue if a corporation elects to make dividend distribution of property instead of selling property and paying tax on the realized income. The basis of tax in the one instance is the selling price less cost; the basis in the other instance is fair market value regardless of cost. The amount of the tax to the 33 stockholders was impressive in the instant case because the fair market value of the dividend was $1,071,426.25 reaching far into the surtax brackets of some of the stockholders (R. 18, 80).

The court below, acting on argument in appellate brief of petitioner below, and for the first time suggested in the development of the case, said:

> "When we come to consider the sale of the stock of the Islands Edison Company we cannot escape the conclusion that the transaction was deliberately planned and carried out for the sole purpose of escaping taxation. • • • Such admitted facts plainly constituted a plan, not to use the harsher terms of scheme, artifice or conspiracy, to evade the payment of the tax. For the purposes of this decision it is not necessary to consider whether such a course as is here shown constituted a fraud, it is sufficient if we conclude that the object was to evade the payment of a tax justly due the Government."

The answer to this conclusion is found in this Court's opinion in *Gregory* v. *Helvering, supra*, entered one day prior to the decision of the court below.

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits cannot be doubted." *U. S.* v. *Isham*, 17 Wall. 496, 506. *Jones* v. *Helvering*, 71 F. (2d) 214, 217, cert. denied and cited with approval by this Court in the *Gregory* case.

(d) *The Relationship of the Stockholders to the Corporation Under the Principles of Agency.*

The court below further held that

> "The sale of the stock in question was, in substance, made by the respondent company through the stockholders as agents or conduits through whom the transfer of title was effected, * * * In substance the transaction here involved was a sale of the stock of the Islands Edison Company by the respondent."

Agency is a question of fact (*Sloat-Darragh Co.* v. *Gen. Coal Co.*, 276 F. 502 (C. C. A.), *Denton* v. *Bracksmith*, 299 F. 599 (C. C. A. 5)). The stipulated facts do not contain a fact which could establish an agency, but are inconsistent with it. No issue was ever raised in these proceedings that petitioner *sold* the stock of Islands Edison Company until *argument* was made in brief of petitioner in the court below. The issue before the trial court was concise and definite. It had solely to do with a dividend distribution. The stipulated facts are that "no contract of sale was entered into" by the officers of the interested companies; that "a written agreement embodying the terms and conditions of the sale" would be submitted "for *approval* to the *stockholders* of the Islands Edison Company *after* the distribution of said stock by the petitioner." "Lucas never held power of attorney to sell the stock for the petitioner or its stockholders." "At no time did petitioner agree with Whetstone or with the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except 910 shares of the Islands Edison Company" (R. 38, 40).

A corporation is not affected by contracts made directly by its stockholders with third persons, whether they own much or little of its stock. *Sellers* v. *Grier, supra; Harris* v. *Muskingam Mfg. Co., supra; Fitzpatrick* v. *O'Neill, supra.*

A sale is defined in the Uniform Sales Act in force in Maryland as follows:

> "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." (Bagby's Code of Maryland, Art. 83, Sec. 22, subdivision 2).

It is stipulated: "The petitioner received no cash or other property for the distribution of the 19,090 shares of the Islands Edison Company stock." (R. 41).

Agency depends on the consent of the parties, manifested by their affirmative acts.

> "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and his consent by the other so to act.";
>
> "(a) The relationship of agency is created as a result of conduct by the parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him and the agent must act or agree to act on his behalf and subject to his control." See Section 1 of the Restatement of the Law of Agency.

The court below, in conflict, said that the negotiations *prior* to the making of the dividend took place "without the stockholders or any of them, who were ostensibly making the sale, being informed, advised or consulted." *After* the distribution, every one of the stockholders acted solely for himself and executed and signed the contract of sale and personally assigned their separate certificates of stock.

2. ***The court below was in error in rendering opinion on facts not found by the Board but for the first time presented on appellate brief of petitioner below.***

The dividend distribution was made March 22, 1928; the stockholders, in their vested right, entered into the contract

of sale of the Islands Edison stock on March 26, 1928. The actual sale took place on May 14, 1928 (R. 41). The selling price differed from the designated market value of the stock at which it was taxable on receipt by the stockholder (R. 40, 41). These facts and those recited under the preceding caption (d) are findings of fact by the Board, and they were binding on the court.

Anchor Co. v. *Commissioner,* 42 F. (2d) 99, 100 (C. C. A. 4);

Merchants Transfer & Storage Co. v. *Burnett,* 49 F. (2d) 56, 58 (C. C. A. 4);

Underwood v. *Commissioner,* 56 F. (2d) 67, 71 (C. C. A. 4);

Old Portland Cement Co. v. *Helvering,* 293 U. S. —, 79 L. Ed. Adv. 170, 173.

The finding of fact by the court below that

> "The sale of the stock in question was, in substance, made by the respondent company, through its stockholders as agents or conduits through whom the transfer of title was effected,"

is not a fact found by the Board but is contrary to the facts found. Agency is a matter of fact. Furthermore, sale of the stock by the corporation as principal or by the stockholders as agents for the principal is nowhere indicated or suggested or submitted in the stipulation of evidence or in the facts found by the Board. Finally, there was no assignment of error before the court which raised the question (R. 50) and the petition for review to the court expressly declared that the "only question to be decided is whether the petitioner realized taxable income in declaring a dividend and paying it in stock of another company" (R. 47). The court erred in departing from the evidence on

an issue raised for the first time in brief of counsel for appellant in the Circuit Court of Appeals.

Phillips v. *Commissioner*, 283 U. S. 589;

Burnet v. *Commonwealth Improvement Co.*, 287 U. S. 415;

Tulsa Tribune Co. v. *Commissioner*, (C. C. A. 10) 58 F. (2d) 937.

CONCLUSION.

On the issue raised and on the facts found in evidence in the trial of the case, the Board of Tax Appeals was correct in finding that the declaration and payment of the dividend in stock of the Islands Edison Company resulted in no taxable income to the petitioner. The Circuit Court of Appeals should be reversed. It is accordingly submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1928:

SEC. 111. (a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

SEC. 112. (a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

SEC. 113. (a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property.

SEC. 115. (a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203(a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) *Source of distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the basis of the stock provided in section 113.

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be

treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112.

T. R. 74:

ART. 627. *Dividends paid in property.*—Dividends paid in securities or other property (other than its own stock) in which the earnings of a corporation have been invested, are income to the recipients to the amount of the market value of such property when receivable by the shareholders. (See, however, section 112 (h) and article 576.) Where a corporation declares a dividend payable in stock of another corporation, setting aside the stock to be so distributed and notifying the shareholders of its action, the income arising to the recipients of such stock is its market value at the time the dividend becomes payable. (See article 333.) Scrip dividends are subject to tax in the year in which the warrants are issued.

ART. 71. *Gross income of corporation in liquidation.*— • • • No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition.

ART. 322. *Bases of computation.*— • • • On the other hand, appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property.